IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 9TH FEBRUARY 2007 / 20TH MAGHA 1928

CRL.A.No. 73 of 2004()

SC.248/2002 of THE ADDL.SESSIONS COURT (ADHOC I II) THODUPUZHA.
CP.45/2002 of JUDL. MAGISTRATE OF FIRST CLASS COURT, ADIMALI.
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APPELLANT:

CHANDRAN, CONVICT NO.7167,
CENTRAL PRISON, THIRUVANANTHAPURAM.

BY ADV. SRI.SAJEEV.T.P.

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

Crl.A.No.73 OF 2004

Dated 9th February, 2007

JUDGMENT

Koshy,J.

Prosecution case is that on 17.9.2001 at about 8.30 p.m. the appellant/accused came to his Menoth house where his wife Mariakutty, children (PWs 5, 7 and 8) and mother (PW6) were living and had a quarrel with his wife Mariakutty, assaulted her and gave heavy blows with his hands and legs. When PWs 5 to 8 screamed on seeing the brutal acts, all of them were pushed out of the room and closed and bolted the door from inside and accused had poured kerosene over her whole body and set her on fire by lighting a match. Mariakutty suffered severe burn injuries and finally she died on 20.9.2001 at 9.30 a.m. According to the prosecution, the accused has committed offences punishable under sections 302 and 506(ii) of the Indian Penal Code. He was convicted for the above offences by the trial court. Aggrieved by the above, this appeal is filed.

2. The children of the accused and deceased (PWs 5, 7 and 8) deposed the incident in accordance with the prosecution version. PW6 is the mother of the accused. She deposed that she was living with the deceased Mariakutty and her children. The accused was living away with another woman and he used to come to his house occasionally. On the day in

question, the accused came there and took away Rs.100/= which was kept for purchasing medicine and came back at about 9 p.m. PW6 deposed that because of the threatening, the amount was given. PW6 and children of the deceased slept in one room and the deceased and accused slept in the middle room. Hearing sounds of beating the deceased, she opened her eyes. At that time, there was light from a kerosene lamp. She asked not to kill Mariakutty, but, she was pushed away. She and children were threatened and pushed out of the room and doors of the room were bolted. They requested for opening the door and when it was pushed, the door crumbled down. She also stated that she understood that the deceased was killed by the accused by pouring kerosene. But, at the same time, she stated that actually she has not seen pouring kerosene and setting fire on the deceased. She was declared hostile as her deposition was contradicted with her statement in Ext.P5 before the police. Apart from the above, her deposition before the Magistrate under Section 164 Cr.P.C. was marked as Ext.P7 which is contrary to the statement given by her in the court. Even the evidence of PW6, mother of the accused, shows that the accused came there at that night, threatened and beaten the deceased and when she and children went there pushing open the door, they were thrown out,

threatened and door was locked. Thereafter, when they pushed open the door, the deceased was in fire. PWs 5, 7 and 8, children of the deceased, also stated that they saw the accused assaulting their mother and pouring kerosene over her. When they cried and resisted, they were pushed out of the room along with PW6 and door was locked and when they pushed open the door they also saw the deceased in fire. Almost the same version was given by them in the statement under Section 164 Cr.P.C. before the Magistrate also.

3. PWs 10 and 11 are independent witnesses who are neighbours. PW10 was residing very near to the house of the deceased. Hearing loud scream when he came found the deceased with numerous burn injuries and she requested him to take her to the hospital. According to him, she conveyed to him that her husband attempted to kill her by pouring kerosene and setting fire. He felt smell of kerosene at that time. PW11 stated that on 17.9.2001 at about 11 O' Clock PW10 along with elder son of the deceased had approached him. At that time, the deceased was found with burn injuries and he also felt the smell of kerosene. He was told to take them to hospital and accordingly they together took her to the hospital. To

him also the deceased told that the accused attempted to kill her pouring kerosene and lighting match thereafter. In the wound certificate also details of the injuries stated was "

4. Even though the incident occurred on 17.9.2001, she died only on 20.9.2001. PW1 Judicial First Class Magistrate recorded dying declaration. The Magistrate found that she was conscious and satisfied himself that she was able to tell what happened and after satisfying with the doctor's help that she is able to say correctly, took her dying declaration in the narrated form. It is stated in the report as well as in deposition by PW1 Judicial First Class Magistrate that he was satisfied that the deceased was able to speak and can speak correctly even though she suffered very serious burn injuries. It is further stated that only he and doctor were present at the time when dying declaration was taken. Ext.P1 is the dying declaration which was in the narrative form. There also it is stated that the accused set her in fire by pouring kerosene and lighting it with the match. Considering Ext.P1 dying declaration stated to have been given to PW1, dying declarations given to PWs10 and 11, her neighbours, who took her to the hospital and the dying declaration

given at the time of examination by the doctor as can be seen from wound certificate and also considering the evidence of the occurrence witnesses, PWs 5 to 8, the court came to the conclusion that prosecution was able to prove the case conclusively.

5. Main case of the defence was that it was not proved whether the deceased was capable of making the dying declaration as the doctor who was present at that time was not examined in court. In this case, in the dying declaration (Ext.P1), the certification of the Lecturer in Surgery, Medical College Hospital, Kottayam was recorded which is as follows:

> "Certified that the patient was fully conscious at the time of giving the statement and she was in a fit state of mind to give the statement."

Apart from the fact that Judicial Magistrate himself deposed that he was satisfied after preliminary questioning that she was capable of giving rational answers, he took the statement only after certification of the doctor convincing himself that she was capable of giving rational answers and merely because that doctor was not examined, it cannot be stated that dying declarations cannot be

accepted. It is not proved that the deceased was incapable of giving rational answers at that time. Further, dying declaration recorded by the Magistrate is not the only dying declaration. Without any tutoring at the time when she was admitted in the hospital, to the doctor who issued wound certificate she stated the cause of death which was tallying with the dying declaration given to PWs 10 and 11 and there was no contradiction. On going through the dying declaration and evidence, we are satisfied that dying declaration recorded is trustworthy and not the result of any tutoring and that dying declaration itself can be accepted for leading to the conviction of the accused. But, in this case, that is not the only evidence. Here, there are occurrence witnesses. Mother and children of the accused have also seen the incident and their evidence is also tallying with other evidence. It is stated that before 164 statement was taken, the Magistrate did not caution them that they are not under obligation to speak or they are not under threat etc. It cannot be treated as a statement of the accused amounting to confession which comes under section 164(4). But, these statements are under section 164(5). Apart from the above, no contradiction was marked in the 164 statement and the statements given by the children. It is true that unlike

161 statement which can be used only for contradiction, 164 statement cannot be used for contradiction and for corroboration. Here, the evidence of children of the accused and deceased before the court needs no corroboration. A reading of the above would show that they were telling truth. It is also admitted by the accused himself that he was living apart from the wife and children and he is living with another lady. The evidence of his own mother is also against him. The totality of the evidence will clearly prove that the accused and accused alone was guilty and nobody else. We fully agree with the trial judge and we confirm the conviction and sentence ordered.

The appeal is dismissed.

J.B.KOSHY
JUDGE

T.R.RAMACHANDRAN NAIR
JUDGE

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